Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1772

JOSEPHINE CALDERONE,

Appellant,

v.

S. THOMAS FERRIGNO, Individually and as Administrator, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK CITY,

Appellees.

ON APPEAL FROM
THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

May 5, 1980

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IN THE

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No. _____

JOSEPHINE CALDERONE,

Appellant,

v.

S. THOMAS FERRIGNO, Individually and as Administrator, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK CITY,

Appellees.

ON APPEAL
FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant Josephine Calderone, a New York City public school teacher, appeals from an order of the New York Court of Appeals denying her motion for leave to appeal from a judgment of the Appellate Division, Second Department. That judgment affirmed wtihout opinion a judgment of the Supreme Court, Kings County, which denied appellant's request for an order permitting her to have a lawyer appear as her "adviser" at the review hearing to be held with respect to a performance rating of "unsatisfactory" which had been given to her by a school official for the 1976-77

academic year. The Board of Education's By-Laws, which provide for such a review hearing, permit appellant to appear at that hearing with an "adviser," but expressly provide that "the adviser may not be an attorney."

OPINIONS BELOW

The judgments and accompanying opinions of the Supreme Court, Kings County, denying appellant's request, both initially and upon reargument, which are not reported, are set forth in the Appendix hereto at 1a-18a. The memorandum of the Appellate Division, Second Department, affirming that judgment without opinion is reported at 69 A.D.2d 901 (Case 20), 416 N.Y.S.2d 158 (1979). (19a-20a).

The Appellate Division's order denying leave to appeal to the New York Court of Appeals, which is not reported, is set forth in the Appendix at 21a. The orders of the Court of Appeals granting the appellee's motion to dismiss appellant's appeal and denying appellant's motion for leave to appeal, which are not reported, are set forth in the Appendix at 22a-24a.

JURISDICTION

The New York Court of Appeals, by order dated December 17, 1979, granted appellee's motion to dismiss appellant's appeal and by order entered February 7, 1980, denied appellant's motion for leave to appeal. This appeal is being timely docketed in this Court within 90 days from the denial of such motion for leave to

appeal. Jurisdiction to hear this appeal is conferred by 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether section 5.3.4B of appellee Board of Education's By-Laws is so arbitrary, capricious and non-rational as to violate the due process requirements of the Fourteenth Amendment to the Constitution of the United States, in providing that:

> "[a]ny person who is summoned to appear before a designated committee in respect of appeals or discontinuance of probationary service . . . is entitled to appear in person, to be accompanied and advised by an employee of the board or a representative of the union recognized by the board as the collective bargaining representative for the employee, to be confronted by witnesses, to call witnesses and to introduce any relevant evidence. The adviser may not be an attorney." (emphasis added)

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

By-Laws of the Board of Education of the City School District of New York:

"5.3.4A Appeals re Ratings.

"Any person in the employ of the board of education who is summoned to appear before the chancellor, or a committee designated by the chancellor, in respect of an appeal from other than a satisfactory rating shall be afforded the opportunity for a review in the manner set forth herein.

"The person appealing shall submit a notice of appeal in letter form to the chancellor, copy to the rating officer, within three (3) weeks from the receipt of said rating . . . The appellant shall be entitled to receive from the rating officer, within three (3) weeks of the receipt of the notice of filing of such appeal . . . a written statement of the reasons upon which the rating officer based the rating from which the appeal is taken and the supporting documentation therefore. Said appellant shall . . . prepare and submit to the chancellor, with a copy to the rating officer, a written answer to the statement of reasons and the documentation provided by the rating officer. The committee designated by the chancellor shall summon the appellant and other officially interested persons and review the matter as soon as practicable but in any event not later than one year from the date of the receipt of the rating by the appellant. The findings and recommendation of the committee shall be submitted to the chancellor for final decision.

"5.3.4B Committee Reviews

> "Any person who is summoned to appear before a designated committee in respect of appeals or discontinuance of probationary service, as set forth above, shall receive written notice of the time and place of the meeting. . . specifying the matter to be considered. The notice shall inform the said person that he or she is entitled to appear in person, to be accompanied and advised by an employee of the board or a representative of the union recognized by the board as the collective bargaining representative for the employer, to be confronted by witnesses, to call witnesses and to introduce any relevant evidence. The adviser may not be an attorney. . . A sound recording shall be kept of the proceedings. The person thus summoned shall be entitled to examine exhibits and, in addition, shall be entitled to receive a duplicate of the sound recording of the proceedings, at cost."

RAISING THE FEDERAL QUESTION

Appellant claimed in her petition to the Supreme Court, Kings County, that section 5.3.4B violated the substantive and procedural due process requirements of the Fourteenth Amendment to the United States Constitution. After the court denied her petition, appellant sought and was granted reargument, since the court had failed in its first opinion to deal with the substantive due process issue raised by her petition. (1a-5a) At no time,

either in the Supreme Court or since, have appellees offered any basis, factual or theoretical, for the exclusion of attorneys from such administrative proceedings. Accordingly, in its second opinion denying appellant's petition, the court below could only speculate as to the possible bases for such an exclusion. (8a-15a).

In none of the subsequent memoranda or orders has either the Appellate Division or the New York Court of Appeals stated any reasons for finding the attorney exclusion rule to be constitutional, despite appellant's arguments to the contrary before those courts. The Court of Appeals found no substantial constitutional question to be "directly involved." (22a-23a).*

STATEMENT OF THE CASE

Appellant Josephine Calderone is a licensed, tenured New York City school teacher. Her school principal rated her performance "unsatisfactory" for the 1976-77 school year. Appellant requested a hearing to review that rating, as provided for by section 5.3.4B of the By-Laws of the Board of Education, and asked that her own lawyer be permitted to appear with her at the hearing. Section 5.3.4B expressly permitted her to appear with an "adviser," but prohibited such an adviser from being an attorney. Accordingly, appellee Ferrigno denied that portion of her request. (1a-2a).

Appellant then petitioned the Supreme Court, Kings County, for an order permitting her to appear at the hearing with her attorney acting as her "adviser." Although appellees offered no explanation for the rule

*Appellant has a second Article 78 proceeding pending which raises no constitutional issues.

excluding attorneys from such hearings, the court denied the petition both initially and upon reargument. (1a-5a, 8a-15a). In reliance upon McAulay v. Board of Education, 46 App.Div.2d 84, 361 N.Y.S.2d 5 (1st Dep't 1974), the court suggested that

> "The interposition of lawyers in educational proceedings is deemed to significantly transform the peculiar character of academic affairs . . . By heightening the self-consciousness of its quasi-judicial role, the appeals agency might well become less tolerant of the teacher's shortcomings and problems." (13a-14a).

The judgment upon reargument was affirmed without opinion by the Appellate Division, Second Department, while appeal from the first judgment was dismissed as academic. (19a-20a). The Appellate Division then denied appellant's motion for leave to appeal to the New York Court of Appeals. (21a).

Appellant had simultaneously appealed as of right to the New York Court of Appeals on the grounds that she was raising constitutional issues. The Court of Appeals granted appellees' motion to dismiss her appeal and then denied appellant's motion for leave to appeal to that Court. (22a-24a).

THE QUESTION IS SUBSTANTIAL

As noted above, appellant seeks relief from the substantive due process

deprivation resulting from appellees' rule barring the appearance of her own lawyer as her "adviser" at the review hearing. This is purely a question of law.*

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* Appellant also claims that the rule prohibiting her attorney from serving as her adviser violates the procedural due process requirements of the Fourteenth Amendment in light of this Court's holding in Goldberg v. Kelly, 397 U.S. 254 (1970), that persons facing administrative determinations which may result in deprivation of certain "property" or "liberty" interests, can at least use their own lawyers even if they may not be entitled to have counsel furnished at public expense. In its initial opinion in the instant case, the lower court found that "the unsatisfactory rating in this case, if upheld on review, will result in a loss of some advancement and perhaps a loss of a substantial salary increment. Obviously . . . these results constitute serious 'property' and prestige losses to petitioner." (4a). See Arnett v. Kennedy, 416 U.S. 134, 157 (1974); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972). Finding that appellant was entitled to a hearing, the court held that procedural due process did not require that she be permitted counsel of her own choosing at such a hearing.

The question whether the substantive due process requirements of the Fourteenth Amendment are violated where an individual is permitted to have an adviser present at a rating review hearing but prohibited from having an attorney serve as such an adviser has never been ruled upon. In Gendron v. Levi, 423 U.S. 802 (1975), aff'g Gendron v. Saxbe, 389 F.Supp. 1303 (C.D.Cal. 1975), the Supreme Court affirmed without opinion a three-judge ruling approving a $10 limitation placed upon the fee an attorney could be paid for appearing in veterans' benefits cases. In Gendron, the District Court stated in unsupported dictum that:

> ". . . Congress, in the circumstances here involved, could have precluded attorney representation in these administrative proceedings, including appeal, without violating the veteran's constitutional rights to procedural due process." 389 F.Supp. at 1307-08 (emphasis added)

Then, speaking in substantive due process terms, the District Court stated that:

> "Congress, in its wisdom, having in mind all the facts and circumstances, has acted in what it deemed to be the best interest of veterans generally in imposing the fee limitation and not capriciously or arbitrarily or in violation of the veteran's constitutional rights." 389 F.Supp. at 1308

There is, however, a very significant distinction between limiting legal fees,

however drastically, and totally banning lawyers from appearing at such hearings. As the District of Columbia Circuit Court stated in a case factually similar to Gendron, "the Supreme Court has never specifically considered a veteran's claim of a right to retained counsel." Staub v. Johnson, 519 F.2d 298, 301 (D.C.Cir. 1975).* Accepting arguendo this Court's approval of Congress' ban on lawyers unwilling to serve veterans for a fee of $10, appellant submits that this Court should not go the added step of condoning a total ban on lawyers, particularly where the promulgator of the ban, appellee Board of Education, has declined to offer any explanation for such an arbitrary and capricious ban. Clearly the Board cannot be said to have been acting for the benefit of teachers, as Congress was held in Gendron to have acted in veterans' interests, and the rule promulgated by the Board should be held unconstitutional.

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* The Court went on to note that appellant, in that case, "urges that the restriction on attorneys' fees infringes upon his rights of free speech and free association." 519 F.2d at 302. This Court might also wish to consider whether excluding lawyers while allowing participation by fellow teachers or union representatives deprives lawyers of equal protection, contrary to the requirements of the Fourteenth Amendment to the Constitution, or unduly limits competition contrary to anti-trust principles.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

May 5, 1980

Respectfully submitted,

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APPENDIX

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OPINION OF THE SUPREME COURT OF NEW YORK

COUNTY OF KINGS

SPECIAL TERM, PART I

Justice Thomas Russell Jones

Index No. 2080/78

June 2, 1978

IN THE MATTER OF THE APPLICATION OF JOSEPHINE CALDERONE,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Mandamus and Prohibition

-against-

S. THOMAS FERRIGNO, Individually and as Administrator, and THE BOARD OF EDUCATION of the City School District of New York City,

Respondents.

Plaintiff, a tenured school teacher, has brought this Article 78 Proceeding to set aside an "Unsatisfactory" rating given her by respondent Administrator, for the 1976-77 academic year, and for an order directing that her private attorney be permitted to assist her at the appeal hearing

to follow. The plaintiff contends that the denial of her right to have the assistance of counsel of her own choosing under these circumstances, deprives her of due process of law.

The petition must be denied on both grounds.

The case of McAuley v. Board of Education, 46 A D 2d 84 (Nov. 1974), (App. Div., 2d Dept.) has settled the latter question, to wit: that in a review hearing involving an "unsatisfactory" rating of a tenured teacher, as a "matter of general procedure, the basic requirements of due process... are not such as to mandate representation by counsel". Mary McAuley was a tenured teacher of Social Studies at Seward Park High School who was rated "unsatisfactory" by her principal. She had sought to stay her transfer to another school, and the resulting loss of the normal salary increment by an Article 78 petition.

In the McAuley case, as here, the teacher was entitled to have the assistance of a representative (from the United Federation of Teachers), the recognized bargaining union which covered most of the employees of the New York City Board of Education (cf also, Brown v. Board of Education of City of New York, 42 A D 2d 702 supra; Matter of Clausen v. Board of Education of the City of New York, 39 A D 2d 708; cf Wolff v. McDonnell, 418 U S 539).

Petitioner has cited the case of Board of Education v. Roth, 408 U S 572, 573, for the proposition that her "property right",

i.e., the presumed "impairment of her freedom to take advantage of other employment opportunities", is involved in the Unsatisfactory Rating assigned her by the respondent. Indeed, the Supreme Court held in Roth that a deprivation of property does occur:

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him. . ." that ". . .notice and an opportunity to be heard are essential".
>
> and
>
> "Where...stigma or other disability (was involved) that foreclosed his freedom to take advantage of other employment..." (Emphasis added)

In this case petitioner is entitled to an administrative hearing and review of her "U" rating; and, as she concedes, her right to continued employment is not at stake, notwithstanding the outcome of these administrative proceedings. The rating itself does not involve "charges" of misconduct against petitioner, which might otherwise damage her professional and personal reputation.

In Arnett v. Kennedy, 416 U S 134, 157 (1974), the Supreme Court held that liberty is offended not by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of the employee. In such case, due process of law requires a hearing to enable the employee to clear his name. In Bishop v. Wood, 96 S. Ct. 2074 - 1976, however, the Court held that no interest in liberty was offended where the "stigmatizing charges" were not publicly

disclosed. If an employee has been afforded a hearing to refute the charges, or absent public disclosure of stigmatizing accusations, liberty is not deemed infringed. Courts have stated that proof of real, discernible or concrete injury to employee's reputation is crucial; that actual loss of employment opportunities, or cloud on employee's integrity, veracity, professional comptence, intelligence or mental stability, are essential to demonstrate deprivation of liberty (See Brooklyn Law Rev., Vol 43:1, 1976, Pg. 14 - et seq).

It does appear, however, that the unsatisfactory rating in this case, if upheld on review, will result in a loss of some advancement and perhaps a loss of a substantial salary increment. Obviously, in the school system hierarchy, these results constitute serious "property" and prestige losses to petitioner. But a hearing is provided for under the By-laws of the Board of Education (Article 5 - Section 5.3.3.), during which petitioner may confront her evaluators and challenge their findings, aided by a Union Representative or fellow teacher, presumably skilled in such matters. No greater rights, i.e. to have her own attorney at her side, are provided by the Union contract, in the Board of Education By-laws or in the reasoning of Roth, supra. As a practical matter, the United Federation of Teachers has contracted with the Board of Education on petitioner's behalf for the precise procedures she now seeks to enlarge by introducing her own counsel. She may not thus reject or modify the terms of her union contract. Other methods of achieving such changes in her contract must be pursued by petitioner if she is so disposed.

Settle order.

Hon. Thomas Russell Jones

J.S.C.

JUDGMENT OF THE SUPREME COURT

OF THE STATE OF NEW YORK

COUNTY OF KINGS

SPECIAL TERM, PART I

At a Special Term, Part I of the Supreme Court of the State of New York, in and for the County of Kings, located at the Courthouse, Adams Street, Brooklyn, New York on the 19th day of June, 1978.

PRESENT: Hon. Thomas Russell Jones,

Justice.

Index No. 2080/78

IN THE MATTER OF THE APPLICATION OF JOSEPHINE CALDERONE,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Mandamus and Prohibition

-against-

S. THOMAS FERRIGNO, Individually and as Administrator, and THE BOARD OF EDUCATION of the City School District of New York City,

Respondents.

The petitioner, JOSEPHINE CALDERONE, having commenced this proceeding pursuant to Article 78 of the Civil Practice Law and Rules, for a judgment directing respondents to allow petitioner's legal counsel to appear and assist petitioner at the administrative review of petitioner's Unsatisfactory rating, and for other relief,

NOW, on reading and filing the Notice of Petition dated the 31st day of January, 1978, the Petition of JOSEPHINE CALDERONE, verified the 31st day of January, 1978, together with the exhibits annexed thereto, the Reply to New Matter, dated the 31st day of March, 1978, together with the exhibits annexed thereto, in support of said petition, the Answer of the respondents, verified the 30th day of March, 1978, together with the exhibits annexed thereto, in opposition to the petition, and the proceeding having duly come on to be heard before me on the 3rd day of April, 1978 and further argument having been had on the 11th day of May, 1978, COUDERT BROTHERS (JOHN CAREY, ESQ., Of Counsel) appearing for petitioner, and ALLEN C. SCHWARTZ, Corporation Counsel (JUDITH KAWER KAY, ESQ., Of Counsel), appearing for respondents, and due deliberation having been had thereon, and on the decision of this Court dated June 2, 1978,

Now on motion of ALLEN G. SCHWARTZ, Corporation Counsel (JUDITH KAWER KAY, ESQ., Of Counsel), attorney for respondents, it is

ORDERED and ADJUDGED that the petitioner's prayer for relief be denied and the petition be dismissed.

E N T E R:

Thomas Russell Jones
J.S.C.

OPINION OF THE SUPREME COURT OF NEW YORK

COUNTY OF KINGS

SPECIAL TERM, PART I

Justice Thomas Russell Jones

Index No. 2080/78

August 31, 1978

IN THE MATTER OF THE APPLICATION OF JOSEPHINE CALDERONE,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Mandamus and Prohibition,

-against-

S. THOMAS FERRIGNO, Individually and as Administrator, and THE BOARD OF EDUCATION of the City School District of New York City,

Respondents.

Petitioner, a tenured school teacher, seeks leave to reargue a motion for a judgment, pursuant to CPLR, Article 78, ordering respondent to allow her to choose an attorney as her "adviser" in the projected appeal hearing to review an "Unsatisfactory" rating given her for the 1976-77 academic year. Petitioner asserts that the memorandum decision dated June 2, 1978

should be reconsidered and reversed in her favor, because the Court "overlooked" certain issues, to wit:

1) That petitioner's right to "substantive" due process had been denied by respondents, who had refused to permit her own attorney-"adviser" to assist her in the forthcoming appeal from an "Unsatisfactory" rating given her at P. S. 79 in Queens, New York;

2) That the case-law criteria interpreting CPLR Article 78, which have determinted whether a government agency acted "arbitrarily, capriciously, unreasonably or without any rational basis", had not been met by respondents;

3) That the review procedures of the Board of Education are subject to Section 501 of the State Administrative Procedure Act, effective September 1, 1976, which accords a person in petitioner's position the right to appear by counsel of her own choice; and

4) That the contract between the United Federation of Teachers and respondent, Board of Education, does not apply to review "U" ratings against tenured teachers in the New York City school system.

Petitioner's motion for leave to reargue is granted. Upon consideration of all memoranda submitted by the parties, and after hearing oral argument by both sides, the Court adheres to its decision dated June 2, 1978, except to strike from the first paragraph the words:

"To set aside an 'unsatisfactory' rating given her by respondent Administrator, for the 1976-77 academic year, and..."

Inasmuch as petitioner insistently claims that she has been denied "substantive" due process in that the Board of Education does not permit her to select her own lawyer-"adviser" for the prospective appeal hearing to review the unsatisfactory rating, the Court again briefly adverts to this issue![1]

---

[1] In Sims v. Board of Education, 329 F. Supp. 678, 684 (D.C.D.N.M., 1971), the Court defined Substantive Due Process as follows:

"Substantive due process is a guaranty against arbitrary legislation, demanding that the law be not unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained."

The Court added:

"The fact that a regulation may be harsh, unfair, inequitable, create hardship or inconvenience, or may be oppressive, severe or drastic, and of doubtful propriety, does not demonstrate its invalidity. The Courts are not guardians of liberties of people against oppressive legislation which does not violate constitutional provisions. The Courts are not concerned with the expediency, necessity, wisdom, utility and propriety of legislative enactments so long as constitutional principles are not violated."

In McAulay v. Board of Education, 46 A D 2d 84 (Novemb er, 1974)(2) the Appellate Division, First Department, declared that a tenured teacher was not entitled to be represented by her own attorney in an academic review of an "Unsatisfactory" rating. It is significant that the Court in McAulay cited, with favor and by way of analogy, Wolff v. McDonnell, 418 U S 539 (1974), a case in which the Nebraska Penal and Correctional Complex declined to grant accused inmates the right to have lawyers represent them in prison disciplinary hearings. In Wolff, the Supreme Court of the United States, at page 570, observed that:

> "The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held."

En passant, the Court notes that issues analagous to this case were similarly disposed of by the United States Court of Appeals, First Circuit, in Downing v. LeBritton, 550 F 2d, 686, 692 (1977) where the Court upheld a regulation of the University of New Hampshire which prevented a discharged employee from bringing his attorney into a grievance proceeding. The Court of Appeals observed that:

---

(2) The issues of the McAulay case were also adjudicated in the United States Eastern District Court, and the Board of Education was sustained (Teachers United for Fair Treatment v. Anker, 445 F. Supp. 469 [1977]).

> "The insertion of counsel (sic!) or other non-University representation into termination proceedings would stimulate lawyer representation of the University and perhaps others; would formalize the hearings and force them into an adversary mold; would cast a litigation chill on decisions to terminate; and would increase the likelihood that many otherwise ordinary personnel actions would become causes celebres." (Emphasis added)

In Re Groban, 352 U S 330, 336 (1956), Justice Frankfurter counselled the honored legal profession, in a concurring opinion, as follows:

> "The utmost devotion to one's profession and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to the erection as a constitutional principal that no administrative inquiry can be had in camera unless a lawyer is allowed to attend".

In Toney v. Regan, 467 F 2d 953 (9th Cir. 1972), cert. denied, U. S. Supreme Court, sub nomine, Mabey v. Regan, 409 U S 1130 (1973), college professors objected to the absence of judicial rules of evidence and the exclusion of attorneys from a grievance hearing. The Circuit Court of Appeals declared that:

> "[I]t is not essential in all circumstances to a fair and adequate hearing that it be conducted ina trial-like atmosphere, complete with attorneys to challenge offered evidence and

> legally trained hearing officers to rule on evidentiary questions.
>
> A proceeding may provide a fair and adequate opportunity for the grievant to present his side of the issues without either the legal technicalities of the hearsay rule or the presence of counsel. It is quite sufficient that the hearing panel consider evidence which reasonable men are accustomed to rely on. And we can well understand that when intelligent, educated college professors are weighing issues of tenure and faculty qualifications - issues crucial to the integrity of an academic institution - they prefer to deal with their peers rather than with the bar." (467 F 2d, at page 958)

The rationale of the Board of Education's By-Laws, viz. Rule 5.3.4B, as viewed by the Appellate Division in McAulay, supra, is clear. The interposition of lawyers in educational proceedings is deemed to significantly transform the peculiar character of academic affairs. If a teacher retains an attorney to assist in presenting academic issues in dispute, the Board of Education, in turn, must introduce its own legal counsel to respond. Lawyers, by training and occupation, are advocates; bound by professional ethics and historical precept to present all the available evidence and every conceivable argument in favor of their clients' cause. They legitimately and vigorously contest all evidence and reasoning which militate against their clients' interests. A lawyer-led appeal proceeding will inevitably become transmuted from an academic setting to that of an adversary trial; be less attuned to the needs and style of the educational

system, teachers and the administrators. By heightening the self-consciousness of its quasi-judicial role, the appeals agency might well become less tolerant of the teachers' shortcomings and problems. The decision making process would likely be more protracted. Unquestionably, a greater financial burden would be placed upon the Board of Education, and all concerned, if attorneys are thrust into the midst of these academic proceedings (cf Gagnon v. Scarpelli, 411 U S 778, 787 [1973]). Rule 5.3.4B is not arbitrary, capricious nor unreasonable. It rests on a rational foundation.

In respect to petitioner's claim that the State Administrative Procedure Act, Section 501, entitles her to appear by counsel, the Court notes that Section 100 of said Act sets forth the intent of the New York Legislature in enacting the statute, reads as follows:

> "The legislature hereby finds and declares that the administrative rule making, adjudicatory and licensing processes among the agencies of state government are inconsistent, lack uniformity and create misunderstanding by the public. In order to provide the people with simple, uniform administrative procedures, an administrative procedure act is hereby enacted... It insures that equitable practices will be provided to meet the public interest.
>
> It is further found that in the public interest it is desirable for state agencies to meet the requirements by the administrative procedure act."

Agency "rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public" are not included within the purview of the Act (SAPA §102[b][i]). Likewise exempted are "rules promulgated to implement agreements pursuant to article fourteen of the civil service law" (SAPA 102[b][v]).

Subdivision 3 of the Section 102 in defining the term "adjudicatory proceeding" states such proceeding to mean "any activity which is not...an employee disciplinary action before an agency..."

Thus, when reading the foregoing statutes, it is discernible that the intent of the State Administrative Procedure Act was to govern the relationship of State agencies with the public, and not to regulate the relationship of State agencies with their employees.

Petitioner's remaining contentions are without merit. As aforesaid, the Court adheres to its decision of June 2, 1978, except that the words:

> "To set aside an "unsatisfactory' rating given her by respondent Administrator, for the 1976-77 academic year, and..."

in the first paragraph, are stricken.

Settle order.

Honorable Thomas Russell Jones

J.S.C.

JUDGMENT OF THE SUPREME COURT

OF THE STATE OF NEW YORK

COUNTY OF KINGS

SPECIAL TERM, PART I

At a Special Term, Part I of the Supreme Court of the State of New York, in and for the County of Kings, located at the Courthouse, Adams Street, Brooklyn, New York, on the 6th day of October, 1978.

PRESENT: Hon. Thomas Russell Jones,

Justice.

Index No. 2080/78

IN THE MATTER OF THE APPLICATION OF JOSEPHINE CALDERONE,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of Mandamus and Prohibition

-against-

S. THOMAS FERRIGNO, Individually and as Administrator, and THE BOARD OF EDUCATION of the City School District of New York City,

Respondents.

The petitioner, JOSEPHINE CALDERONE, having commenced this proceeding pursuant to Article 78 of the Civil Practice Law and Rules, for a judgment directing respondents to allow petitioner's legal counsel to appear and assist petitioner at the administrative review of petitioner's Unsatisfactory rating, and for other relief.

NOW, on reading and filing the NOTICE OF MOTION for Reargument dated June 26th, 1978 and Affirmation of John Carey, Esq. dated June 23rd 1978, together with the exhibits annexed thereto, the Affirmation in Opposition to the Motion for Reargument of Judith Kawer Kay, Esq. dated June 30, 1978, and the proceeding having duly come on to be heard before the Hon. Thomas Russell Jones on the 1st day of August, 1978, COUDERT BROTHERS (JOHN CAREY, ESQ., OF COUNSEL) appearing for petitioner, and ALLEN G. SCHWARTZ, Corporation Counsel (JUDITH KAWER KAY, ESQ., OF COUNSEL), appearing for respondents, and due deliberation having been had thereon, and on the decision of this Court dated August 31, 1978,

NOW, on Motion of ALLEN G. SCHWARTZ, Corporation Counsel, attorney for respondents, it is ordered

1. That the motion for reargument is granted.

2. That the Court adheres to its decision dated June 2, 1978 in all respects, except to strike from the first paragraph the words:

"To set aside an 'unsatisfactory' rating given her by respondent

Administrator, for the 1976-77 academic year, and ...".

ORDERED and ADJUDGED that the petitioner's prayer for relief be denied and the petition be dismissed.

E N T E R:

Hon. Thomas Russell Jones

J.S.C.

ORDER ON APPEALS FROM JUDGMENTS

THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

SECOND DEPARTMENT

Hon. Samuel Rabin, Justice Presiding
Hon. Frank A. Gullota,
Hon. Charles Margett,
Hon. M. Henry Martuscello,
Associate Justices

In the Matter of Josephine Calderone,

Appellant,

-against-

S. Thomas Ferrigno, Individually and as Administrator, et al.,

Respondents.

In the above entitled cause, the above named Josephine Calderone, petitioner, having appealed to this court from (1) a judgment of the Supreme Court, Kings County, entered June 22, 1978 and (2) a further judgment of the same court entered October 13, 1978, which, upon reargument, inter alia, adhered to the original determination; and the said appeals having been argued by John Carey, Esq., of counsel for the appellant, and due deliberation having been had thereon; and

upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the appeal from the judgment entered June 22, 1978 is hereby dismissed as academic, without costs or disbursements, and it is further

ORDERED that the judgment entered October 13, 1978 appealed from is hereby unanimously affirmed, without costs or disbursements.

Enter:

Irving N. Selkin
Clerk of the
Appellate Division

April 30, 1979

DECISION OF THE SUPREME COURT

OF THE STATE OF NEW YORK

APPELLATE DIVISION

SECOND DEPARTMENT

No. 3454

In the Matter of Josephine Calderone,

Appellant,

-against-

S. Thomas Ferrigno, Individually and as Administrator, et al.,

Respondents.

Motion by appellant for leave to appeal to the Court of Appeals from an order of this court, dated April 30, 1979 which affirmed a judgment of the Supreme Court, Kings County, entered October 13, 1978.

Motion denied.

Rabin, J.P., Gulotta, Margett & Martuscello, JJ., concur.

September 20, 1979

ORDER OF THE COURT OF APPEALS

OF THE STATE OF NEW YORK

At a Session of the Court, held at Court of Appeals Hall in the City of Albany, on the seventeenth day of December, A.D. 1979

PRESENT: Hon. Lawrence H. Cooke, Chief Justice, presiding.

Matter No. 1042

In the Matter of the Application of Josephine Calderone,

Appellant,

v.

S. Thomas Ferrigno, Individually and as Administrator, et al.,

Respondents.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial

constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

ORDER OF THE COURT OF APPEALS

OF THE STATE OF NEW YORK

Matter No. 1042

February 7, 1980

In the Matter of the Application of Josephine Calderone,

Appellant,

vs.

S. Thomas Ferrigno, Individually and as Administrator, et al.,

Respondents.

Motion for leave to appeal denied.

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

IN THE COURT OF APPEALS

FOR THE STATE OF NEW YORK

Index No. 3454

In the Matter of the Application of Josephine Calderone,

Petitioner-Appellant,

-against-

S. Thomas Ferrigno, Individually and as Administrator, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK CITY,

Respondents-Respondents.

Notice is hereby given that Josephine Calderone, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, affirming the dismissal of the complaint, entered in this action on February 7, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: March 13, 1980
New York, NY

John Carey
COUDERT BROTHERS
Attorney for
Petitioner-
Appellant

Supreme Court, U. S.
FILED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 79-1772

JOSEPHINE CALDERONE,

Appellant,

v.

S. THOMAS FERRIGNO, individually and as Administrator, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Appellees.

ON APPEAL FROM
THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS OR AFFIRM

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
100 Church Street
New York, N.Y. 10007
Counsel for Appellees

June 4, 1980

CAROLYN E. DEMAREST,
ALEXANDER J. WULWICK,
of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 79-1772

JOSEPHINE CALDERONE,

Appellant,

v.

S. THOMAS FERRIGNO, individually and as Administrator, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Appellees.

ON APPEAL FROM
THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of New York on the ground that it is manifest that the question on which the decision of

the cause depends is so unsubstantial as not to require further argument.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of a certain provision of Section 5.3.4B of the By-laws of the Board of Education of the City of New York [the "Board"]

This by-law provides, in pertinent part, that any teacher who appeals from an unsatisfactory rating shall be "entitled to appear in person, to be accompanied and advised by an employee of the board or a representative of the union ..., to be confronted by witnesses, to call witnesses and to introduce any relevant evidence." The section also

section also provides that "[t]he advisor may not be an attorney." The above mentioned procedures are also to be found in the collective bargaining agreement between the United Federation of Teachers, of which Appellant is a a member, and the Board of Education.

B. The Proceedings Below

The Appellant, after receiving an unsatisfactory performance rating for the academic year 1976-1977, perfected an administrative appeal pursuant to the Board's by-laws. She was denied her request to be assisted by an attorney at the committee review meeting. Contending that the denial deprived her of substantive and procedural due process rights, she instituted the present proceeding to set aside her adverse

rating and for an order directing that she be permitted the assistance of her private attorney. The New York Supreme Court of Kings County, Special Term, by order dated October 6, 1978, dismissed the petition and denied Appellant the relief sought (1a)*. Upon appeal to the Supreme Court, Appellate Division, the court affirmed the decision of the lower court without opinion (19a). 69 AD 2d 901 (2d Dept., 1979). Leave to appeal was subsequently denied by the Appellate Division (21a) (decision not reported) and by the New York Court of Appeals (24a). 49 NY 2d 701 (1980). The Court of Appeals had previously dismissed Appellant's appeal as of right

*Numbers in parentheses refer to pages of Appellant's Appendix.

on the ground that a substantial constitutional question had not been directly involved (22a). 48 NY 2d 974 (1979).

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING CONSIDERATION BY THIS COURT.

Appellant contends that the exclusion of attorneys from §5.3.4B rating review proceedings conducted by the Board of Education violates her right to due process of law. Appellees submit that the prohibition is a rational exercise of the Board's rule-making authority. The review is essentially a fact-finding proceeding, and is not intended to be judicial or quasi-judicial in nature. The teacher's legal rights are not at issue, and no loss of employment or disciplinary action is threatened. No charges have been lodged against Appellant.

See Appeal of Bohrer, 13 N.Y. Educ. Dept. Rep. 56, 58 (1973); cf. Morrisey v. Brewer, 408 U.S. 471 (1972) and In re Groban, 352 U.S. 330 (1957) (FRANKFURTER, J. concurring).

In the context of parole revocation hearings, this Court has found that, on balance, the introduction of counsel may be more detrimental than helpful to the decision-making process, and upheld the exclusion of attorneys. See Gagnon v. Scarpelli, 411 U.S. 778, 787-788 (1973). A fortiori, the presence of attorneys at rating review proceedings is similarly unwarranted. Cf. Downing v. LeBritton, 550 F. 2d 689, 692 (1st Cir. 1977).

While not entitled to legal representation, Appellant can take advantage of the assistance of a union representa-

tive or fellow employee, and, in addition, is permitted to be confronted by witnesses, to call witnesses, and to introduce any relevant evidence. By-laws §5.3.4B. Under the circumstances, this is all the process that should be due. See Toney v. Reagan, 467 F. 2d 953 (9th Cir., 1972), cert. den. sub nom., Mabey v. Reagan, 409 U.S. 1130 (1973); Teachers United For Fair Treatment v. Anker, 445 F. Supp. 469, 477 (E.D.N.Y., 1977); Hecht v. Monaghan, 307 N.Y. 461 (1954); Matter of McAulay v. Board of Educ., 46 AD 2d 84 (1st Dept., 1974).

Based upon the authorities cited above, this appeal does not present a substantial federal question.

III

Conclusion

Wherefore, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellees respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of New York.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
of the City of New York,
100 Church Street
New York, N.Y. 10007
Counsel for Appellees.

CAROLYN E. DEMAREST,
ALEXANDER J. WULWICK,
of Counsel.